United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

(corrected copy)

74-1434

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD WALLACE, et al.,

Plaintiffs-Appellees,

-against-

MICHAEL KERN, et al.,

Defendants-Appellants.

Docket No. 74-1434

BRIEF FOR THE LEGAL AID SOCIETY, AMICUS CURIAE

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Dated: April 22, 1974

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BRIEF FOR
THE LEGAL AID SOCIETY, AMICUS CURIAE

The Interest of the Amicus

This brief is submitted, with the written consent of all parties to this appeal, in support of plaintiffs' position seeking affirmance of the order of the district court.

The Legal Aid Society's Criminal Defense Division represents the great majority of indigent defendants awaiting trial in New York City. As of March 1, 1974, the Society represented 1617 defendants who were awaiting disposition of felony charges in Kings County Supreme Court. Of this number, 659 were in jail.

In requiring that the defendants in this case accord a prompt trial to all criminal defendants in Kings County, the district court has now granted the relief urged by the Legal Aid Society in the brief filed with this Court in the Society's own appeal from an earlier order in this case. Brief of Appellant Legal Aid Society, in Wallace v. Kern (2d Cir. Doc. Nos. 73-1826, 1830, 1831), pp. 44-48*

The Legal Aid Society believes that Judge Judd's order is a significant step toward the vindication of our clients' right to a speedy trial, a right which has been unenforceable in the courts of the State of New York. A reversal of the district court's order, in our opinion, would be gravely detrimental to the quality of justice available to indigent criminal defendants in this State.

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*The Legal Aid Society was itself defendant-appellant in an appeal from an order entered in this and two related cases. Wallace v. Kern, 481 F. 2d 621 (2d Cir. 1973), cert. denied, 42 U.S.L.W. 3387 (Jan. 7, 1974).

STATEMENT

Pre-Trial Delay In Kings County

Over three years ago, then Chief Judge Lumbard had occasion to write:

> In a large proportion of the 2,899 jail cases [awaiting disposition of felony charges, in New York State] where delays already were three months or longer, more than six months had elapsed since arrest by April 1, 1970. In many New York and Kings County homicide cases the detention before trial had already exceeded one year.
>
> While the present condition in the metropolitan counties is frequently described as an "emergency," its progress has been certain and notorious for the past few years. Thus the situation is more accurately described as chronic.
>
> United States ex rel. Frizer v. McMann, 437 F.2d 1312, 1315 (2d Cir. 1971) (en banc).

In that opinion, the Court cited figures supplied by the Judicial Conference of the State of New York which showed that, as of April 1, 1970, there were 790 persons accused of felonies in Kings County who had been held in jail three months or more. By December 1, 1972, this figure had risen to 935, of whom 644 had been in custody for more than six months. Thorne v. Warden, 479 F.2d 297, 299, n.2 (2d Cir.

1973). In February 1973, the New York State Court of Appeals held that nine months of incarceration was not "such a delay as to constitute a denial of the constitutionally protected right to a prompt trial." People ex rel Franklin v. Warden, 31 N.Y. 2d 498, 503 (1973). And in April, 1973, Karriem Thorne finally obtained a trial after more than fourteen months in the Brooklyn House of Detention. Thorne v. Warden, supra. By July 9, 1973, 707 defendants with cases pending in Kings County Supreme Court had been in custody for more than six months, 210 for more than a year. Opinion of March 7, 1974 (hereinafter, "Opinion"), reproduced in Appellant's Appendix A, p. 4.

While statistics presented to the District Court indicate that there has been some progress in reducing the backlog, it is clear that hundreds of persons continue to be imprisoned without trial in Kings County for more than six months, and that many of these defendants must spend more than a year awaiting trial.

In addition to the fact of continuing chronic delays, the district court received evidence of the conditions under which pre-trial detainees are confined, and of the effects of

long confinement under such conditions. Opinion, pp. 4-5, 10-11.* The court premised its decision in part upon a factual finding that the prolonged incarceration of the plaintiffs under these conditions is oppressive in character and constitutes an irreparable hardship. Opinion, pp. 11, 20, 21-22. Besides finding a violation of plaintiffs' right to a speedy trial, the trial court held that "[s]ince an unconvicted defendant in a detention facility actually enjoys fewer amenities than a convicted prisoner in a correctional institution, over-long confinement without being convicted, simply for being poor, is also a denial of due process of law." Opinion, p.15

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*Besides the testimony presented in the present case, the district court makes reference to evidence presented in two class actions, Jenkins v. Malcolm, E.D.N.Y. Doc. No. 73-C-261, and Valvano v. Malcolm, 70-C-1390, brought by detainees of the Brooklyn and Queens Houses of Detention, respectively. The Commissioner of Corrections of the City of New York, Benjamin J. Malcolm, is a defendant in those cases as well as in the case that is the subject of this appeal.

POINT I

THE DISTRICT COURT WAS CORRECT IN ORDERING THAT ANY PERSON CHARGED WITH A FELONY IN KINGS COUNTY SUPREME COURT WHO HAS BEEN IN CUSTODY AWAITING TRIAL FOR OVER SIX MONTHS (OR NINE MONTHS FOR PERSONS CHARGED WITH MURDER) BE TRIED WITHIN FORTY-FIVE DAYS AFTER SUBMISSION OF A WRITTEN REQUEST FOR TRIAL, OR ELSE RELEASED ON HIS OWN RECOGNIZANCE.

A. Introduction: The Right to a Speedy Trial

In Klopfer v. North Carolina, 386 U.S. 213, (1967), the Supreme Court held that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment," having "its roots at the foundation of our English law heritage," and that accordingly it is binding upon the States through the Fourteenth Amendment.

Chief Justice Warren's detailed review of the history of the right to a speedy trial makes it clear that in the English common law tradition, when an accused was held in custody he was entitled to a trial at the next term of court, or within about four months. Klopfer v. North Carolina, supra, 386 U.S. at 223-24. This right to a prompt trial was codified in the Habeas Corpus Act (1679), 31 Car. II c.2, which provided "both for a speedy judicial inquiry into the justice of any

criminal charge, and for a speedy trial of prisoners remanded to await trial". 9 Holdsworth, A HISTORY OF ENGLISH LAW 118. Under the Act, "[p]risoners indicted for treason or felony must be tried at the next session or bailed; but if it appear that the king's witnesses cannot be ready at that time, they may be committed till the following term; if not tried, then they must be discharged." Ibid. Cf. 3 Blackstone, COMMENTARIES, c.8, 135-137. Since the Supreme Court has repeatedly held that the Habeas Corpus Act of 1679 was declarative of the common law as it existed at the time of the framing of the Constitution (see, e.g., McNally v. Hill, 283 U.S. 131, 136 (1934)), it is clear that the right to a speedy trial, as it was understood when the Sixth Amendment was enacted, included the right of a person in custody to obtain a trial, upon demand, within a few months at most.

Seen in this context, then, the order of the district court is an appropriate implementation of "the duty of the federal courts ... to protect that right whenever there is a substantial claim of its violation." United States ex rel Frizer v. McMann, supra, 437 F.2d at 1315.

B. The District Court Correctly Applied The Relevant Criteria Set Forth In Barker v. Wingo, 407 U.S. 514 (1972).

In Barker v. Wingo, 407 U.S. 514 (1972) the Supreme Court for the first time "attempted to set out the criteria by which the speedy trial right is to be judged." Id. at 516. The Court specifically identified four of the factors "which courts should assess in determining whether a particular defendant has been deprived of his right": (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. Id. at 530. The Court also set forth "the interests of defendants which the speedy trial right was designed to protect":

> (i) to prevent oppressive pretrial incarcerations; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

Id. at 532. The Court stated that prejudice to the defendant should be assessed in the light of these interests. Ibid.

In its opinion, the Court found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months," and ac-

cordingly refused "to engage in legislative or rulemaking activity." Id. at 523. Having also rejected the "demand-waiver rule", which had been adopted below by the Sixth Circuit, as too insensitive to a fundamental right, the Court adopted a "balancing test" for courts to use in determining whether there has been a deprivation of the right. Under this test the four "related factors" listed above "must be considered together with such other circumstances as may be relevant." Id. at 533. Courts are thus required "to approach speedy trial cases on an ad hoc basis," and to rule on the basis of the particular circumstances of each case. Id. at 530.

The appellants rely heavily upon the latter aspect of the Barker decision in arguing that the district court's order violated the principles announced in that case. This reliance, it is submitted, is misplaced.

When due consideration is given to the differences between the factual situations involved in Barker and in the present case, and between the kinds of relief sought in the two cases, it becomes clear that the order of the district court is in fact an appropriate application of the teachings of Barker to an entirely different set of circumstances.

In Barker, the issue was whether a man convicted of murder had been so prejudiced, and his defense so impaired, by a delay of five years between arrest and trial that he should be released and the indictment against him dismissed.

As in most speedy trial cases, the only possible result, had a violation of the right to a speedy trial been found, would have been "the unsatisfactorily severe remedy of dismissal of the indictment." 407 U.S. at 522.* Although Barker had spent ten months in jail, the Court found that he had neither sought nor desired a trial during that period. Impairment of his defense, and the lengthy subjection to anxiety and concern, were the two interests in which Barker could claim to have been prejudiced.

The instant case, on the other hand, does not directly involve impairment of the defense - which the district court found would vary with the circumstances of the individual defendants - nor does the relief granted include dismissal of the indictments. Rather, the right to a speedy trial is invoked to protect the first-mentioned of the interests which the right was designed to secure, the prevention of

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*That this is not always "the only possible remedy" (Ibid) is evident from the decision in Braden v. Kentucky, 410 U.S. 484 (1973), where the court required dismissal only in the event that the respondent Kentucky court failed to give petitioner a trial within sixty days.

oppressive pre-trial incarceration. Unlike the situation in Barker, relief from this type of prejudice can be achieved either by granting those in jail prompt trials, or else by releasing them from jail until they have been tried; the more severe remedy of dismissal of the indictment may be unnecessary. In addition, since the fact of oppressive pre-trial detention and excessive delay affects all detainees in Kings County, and cannot be remedied for an individual detainee without prejudicing the others, the appropriate relief in this case is applicable to the entire plaintiff class.

When the balancing test prescribed in Barker v. Wingo is applied to the circumstances prevailing in Kings County which affect all of the plaintiffs below, the weight of each of the four factors tips the balance sharply in favor of the relief granted by the district court.

The first of the factors to be assessed in determining whether there has been a violation of the right to a speedy trial is the length of the delay. The court held that the length of delay which can be considered "presumptively prejudicial", triggering an inquiry into the other factors, "is necessarily dependant upon the peculiar circumstances of the case." Id. at 530. It can hardly be doubted that under the circumstances prevailing in Kings County, a delay of more than six months during which the defendant is imprisoned under a regimen more severe than that imposed upon convicted prisoners, is enough to be presumed prejudicial and to necessitate the inquiry prescribed by Barker. This circumstance of a delay

of more than six (or nine) months is present in the individual cases of all those who are entitled to invoke the terms of Judge Judd's order. To fail to provide a trial within forty-five days to a defendant who requests it after more than six months of what is, in effect, pre-trial punishment, would certainly "endanger the values" protected by the right to a speedy trial (Id., at 522), as well as the values protected by the right to due process of law.

An additional circumstance justifying the finding that six months (plus forty-five days) of delay is a violation of the right to a speedy trial is the fact that the New York State Criminal Procedure Law, §30.30(2) requires that the District Attorney be ready for trial within ninety days from the arrest of a defendant in custody, with the exclusion of certain "reasonable periods of delay" attributable to special circumstances. Criminal Procedure Law 30.30(4). The order of the district court thus allows for a delay two and one-half times as long as §30.30 provides, and in addition provides that periods of delay that would be excludable under §30.30(4) will toll its order during the final forty-five days. In view of the fact that the state legislature has determined that ninety days is ordinarily adequate time for the prosecution to prepare its case, and that extraor-

dinary delays can be excluded during the final period, the time allowed by the district court's order is clearly adequate. While The Legal Aid Society would argue that the amount of delay that is considered presumptively prejudicial should be even shorter for jailed defendants than the district court provided, it cannot reasonably be argued that detention without trial for more than seven and one-half months (and ten and one-half months for accused murderers) of defendants who have demanded a trial can be permitted if the Sixth and Fourteenth Amendment guarantees have any force at all.

Finally, once a court has considered the "peculiar circumstances of the case" - which, in this case, apply to all pre-trial detainees in Kings County - Barker v. Wingo in fact requires that the court determine what period of delay will be considered "presumptively prejudicial" under those circumstances. Id., at 530-531. This is what the district court has done in this case.

The second factor listed in Barker is the reason for the delay. The reason why none of the plaintiff class can obtain trials within six months is overcrowded courts, and the unwillingness of various state officials to provide the necessary facilities to bring them to trial within a reason-

able period. In view of the chronic nature of this problem and the state's persisting failure to remedy it, this factor must be weighed in favor of the relief granted below. Although this factor is "weighted less heavily" in Barker v. Wingo than deliberate impairment of the defense (Id., at 531), it deserves a heavier weight when it results not merely in delay, but in oppressive pre-trial confinement, and when, as in Kings County, the State has had many years to correct the situation.

Appellants suggest in their brief (at 24) that, since there may be particular reasons why individual detainees cannot be tried within their first six months of detention, the resulting periods of delay in those cases should not be charged to the State. However, the evidence before the district court established that there was virtually no likelihood that any case would be brought to trial within the first six months, and, consequently, that proceedings involving a particular defendant during the first several months of confinement have no effect on when his case can be tried. To put it another way, the first six months of delay do not in any sense result from proceedings brought by or involving the defendant: he would not be accorded a trial during that period in any event. Since the first

several months of confinement are essentially "dead time", spent waiting in line for trial, the District Judge was correct in ordering excluded only those periods of delay cognizable under Criminal Procedure Law §30.30 (4)(a) which occur during the period after the expiration of six months and after the request for a speedy trial.

The third factor is the defendant's assertion of his right. In order to benefit from the district court's order, each of the members of the plaintiff class must actually request a trial. Besides being itself a factor to be weighed heavily in favor of the person asserting the right to a speedy trial, the fact of a demand for a trial by a person who is in jail is also a circumstance which renders a delay of more than six months - plus forty-five days - presumptively prejudicial.

The fourth factor is prejudice to the defendant. As noted above, the particular type of prejudice before the Court in this case is oppressive, over-long pre-trial incarceration, and the special anxiety and concern resulting therefrom. This factor affects similarly all defendants in New York City detention facilities, and this, as the district court observed (Opinion, p. 22) makes class relief particularly appropriate in this case.

The order of the district court gives due regard to individual circumstances by providing that each of the persons benefitting from the order must have requested a prompt trial, and that delays cognizable under Criminal Procedure Law §30.30 (2)(4) be excluded from the forty-five day period after the request. The district court wisely refused to permit any delay to be charged to jailed defendants during the period when the state would not, in any event, have accorded them a trial. Since all of the factors identified in Barker v. Wingo weigh heavily in favor of requiring a prompt trial for all detainees who comply with the district court's order, no purpose would be served, except further delay, by requiring further inquiry into the facts of each detainee's individual case.

POINT II

PRINCIPLES OF COMITY DO NOT BAR THE RELIEF GRANTED BY THE DISTRICT COURT.

Appellants argue that the order of the district court, since it requires release from custody of members of the plaintiff class who are not tried within the prescribed period, violates the principles enunciated in Preiser v. Rodriguez,

411 U.S. 475 (1973), applying the provisions of 28 U.S.C. §2254.

In Preiser, the Court held that whenever the state prisoner challenges the fact or duaration of his imprisonment, the action must be treated as a petition for habeas corpus and the provisions of 28 U.S.C. §2254 requiring exhaustion of available state remedies, must be complied with.

Preiser does not bar the relief granted in this case, first, because the decision of the New York State Court of Appeals in People ex rel. Franklin v. Warden, Brooklyn House of Detention for Men, 31 N.Y. 2d 498 (1973), clearly establishes the "absence of available State corrective process or circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. §2254 (b). In Franklin, detainees who had been in custody for more than six months without trial sought release on their own recognizance unless they were given immediate trials. As noted earlier, the New York Court of Appeals concluded, after the petitioners had been in jail for approximately nine months,

> that in none of the cases now before us has there so far been such a delay as to constitute a denial of the constitutionally protected right to a prompt trial.
>
> Id., at 503.

The Court of Appeals granted the petitioners in Franklin preferences that would enable them to be tried within three months from the date of its decision, after almost a year in jail.* Given this refusal of the highest court of the state to find that a delay of from nine months to a year, in cases where the delay was attributable exclusively to "calendar congestion and the lack of adequate court facilities," Id., at 500, would violate the right to a speedy trial, any further application to the state courts by members of the plaintiff class would be an exercise in futility.

Second, it is by no means clear that Preiser and §2254 apply to pre-trial custody at all. A panel of this Court recently observed:

> We note that the Court may have already narrowed Prieser v. Rodriguez in its subsequent summary affirmance of Miller v. Gomez, 412 U.S. 914 (1973). In that case, a three-judge court in this circuit had held that indicted, but unconvicted, felons need not exhaust state remedies in a §1983 action challenging their incarceration in

*As both the New York Court of Appeals, and this Court in Thorne v. Warden, supra, have noted, such preferences are themselves an unsatisfactory remedy in a situation where other inmates have so equally valid claim to a prompt trial.

> hospitals for the criminally insane. 841 F.Supp. 323, 328-329 (S.D.N.Y. 1972). In view of the detailed dissent by Judge Moore on the exhaustion issue (id., at 333-336), we cannot believe that the Court overlooked this jurisdictional question in its summary affirmance. Giving such an affirmance the deference it is due, Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir. 1973), we think the obvious way to reconcile Prieser and Gomez is to say that while the Court will require exhaustion in cases in which state prisoners seek their immediate release, it will not do so in the case of those incarcerated, or as here merely threatened with imprisonment, without benefit of the normal criminal process.
>
> Blouin v. Dembitz, 489 F.2d 488, 491, n.6 (1973).

Such a limitation of the holding in Preiser to state prisoners serving sentences of conviction is consistent with the language of the statute, which provides:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State....
>
> 28 U.S.C. §2254 (Emphasis Supplied).

Pre-trial custody is not custody pursuant to a "judgment" in the normal meaning of that word. Cf., Commissioner of Internal Revenue v. Estate of Bedford, 325 U.S. 283, 284-288 (1945); United States v. Garber, 413 F.2d 284 (2d Cir. Cir. 1969).

Finally, the order of the district court, by giving the courts of the State the opportunity to try the members of the plaintiff class before the violation of the right to a speedy trial has become so severe as to require dismissal of the indictment, interferes far less with state functions and state interests than would orders dismissing the indictments after the violation has become irremediable.

POINT III

THE CONVENING OF A THREE JUDGE DISTRICT COURT IS NOT REQUIRED IN THIS CASE.

New York Criminal Procedure Law §30.30 provides that when a defendant is in custody "the people" must be ready for trial within ninety days or else the defendant must be released.

In Franklin, supra, 31 N.Y. 2d at 502 New York Court of Appeals held that this provision cannot be construed to

to require release when a case cannot be tried for reasons other than the failure of the prosecutor to be ready for trial, such as court congestion.

However, the Court of Appeals went on to state that "the matter does not end there," and noted that "cases such as those now before us present questions as to possible delay unreasonably depriving the appellants of their constitutional right to a prompt trial." Ibid. Although the court did not find such a denial in Franklin, the clear implication of its opinion is that nothing in §30.30 would prevent them from ordering release in an appropriate case. Indeed, in granting preferences in Franklin, the Court of Appeals granted a form of relief not included in the provisions of §30.30.

Thus the highest court of the State of New York has interpreted Criminal Procedure Law §30.30 as a non-exclusive remedy, and the district court's order in this case does not in any sense abrogate its provisions or restrain its enforcement. Accordingly, a three-judge court under 28 U.S.C. §2281 is not required.

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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